IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 225 of 1994

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MURLIDHAR LAHORIMAL - Applicant(s)

Versus

COMMISSIONER OF INCOME-TAX - Respondent(s)

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Appearance :
MR MANISH J SHAH for Applicant
MR MANISH R BHATT for Respondent
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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 14/11/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1.The Income Tax Appellate Tribunal, Ahmedabad Bench “A” has referred the following two questions under Section 256(2) of the Income Tax Act, 1961 (the Act) at the instance of the assessee:

> “[1] Whether on the facts and circumstances of the case, the ITO was justified in reopening the assessment u/s 147(a) of the I.T. Act?
>
> [2] Whether, in the facts and circumstances of the case, the Tribunal was justified in holding that the addition of Rs.50,000/- in the total income of the assessee is income from undisclosed sources?”

2.The assessment year is 1981-82 and the

accounting period is Samvat Year 2036. The assessee, an individual, had filed a return of income accompanied by a copy of his capital account in the partnership firm where he was a partner. The capital account contained a credit entry showing a sum of Rs.50,000/- as gift received. The assessment was originally completed on 25th August 1981 under Section 143(1) of the Act.

3. On 30/6/1981, Shri Ramji Nanji, the donor, had filed a return of gift in respect of the above stated gift of Rs.50,000/- and the assessment came to be completed under Section 15(3) of the Gift Tax Act, 1958 vide order dated 17/3/1986.

4. On the same day i.e. 17/3/1986, the assessing officer, having jurisdiction over the assessee, recorded reasons to the effect that he believed that the assessee had failed to furnish fully and truly all material facts relevant for

assessment of his income chargeable to tax and hence, such income had escaped assessment within the meaning of section 147(a) of the Act. Notice under section 148 of the Act was issued and served on the assessee on the same day, namely, 17/3/1986. According to the assessing officer, the gift of Rs.50,000/- received by the assessee on 29/7/1980 was not a genuine gift and was liable to be taxed as unexplained income being the credit in the capital account. During course of re-assessment proceedings, the assessing officer examined the assessee on oath as well as Shri Ramji Nanji. After appreciating the evidence which had come on record, the assessing officer came to the conclusion that the credit of Rs.50,000/- appearing in the capital account remained unexplained; that the alleged receipt of gift from Ramjibhai was not genuine, and was nothing but assessee's own undisclosed income which had been credited to the assessee's

capital account.

5.The assessee carried the matter in appeal before the Deputy Commissioner of Income Tax (Appeals), who vide order dated 22nd December 1988, allowed the appeal holding that the re-assessment proceedings were bad in law as the same were based on suspicion and change of opinion since all the materials were on record. On merits, he came to the conclusion that the gift was genuine, the donor having accepted the factum of gifting the amount by way of demand draft, and that the assessee had discharged the onus which was on the assessee. He, therefore, deleted the addition of Rs.50,000/- made by the assessing officer.

6.The revenue carried the matter in appeal before the Tribunal and succeeded. The Tribunal came to the conclusion that not only the reopening was justified, but in light of the reasons

given by the assessing officer in the assessment order, it was not probable that the assessee received Rs.50,000/- or any part thereof as a gift from Shri Ramji Nanji.

7.Heard Mr.Manish J.Shah, the learned advocate appearing on behalf of the applicant assessee. He made three-fold submissions: Firstly, that gift tax proceedings having been completed and tax levied and collected from the donor, the same amount could not be treated as an income in hands of the assessee; secondly, the reopening of completed assessment beyond the period of four years was bad in law, there being full and true disclosure of all material facts; and thirdly, on merits, the addition was not warranted, the assessee having discharged the onus which lay on it by producing the donor and acceptance of the gift by the donor as well as establishing the capacity of the donor. He has placed reliance on the decision in the case

of Commissioner of Wealth-Tax v. K.N. Shanmughasundaram, [1998] 232 ITR 354 in respect of the first proposition.

8.Mr.M.R.Bhatt, the learned senior standing counsel appearing on behalf of the respondent revenue supported the order of the Tribunal. According to him, the view adopted by Tribunal was a possible view on facts of the case, and hence, this Court should not undertake an exercise of re-appreciating the evidence in its advisory jurisdiction. It was also submitted that whether the gift tax proceedings had been completed or not in the hands of the donor, was not germane for the purposes of deciding the taxability of the amount in the hands of the assessee and correct income had to be taxed in the hands of the right person regardless of any other proceedings that might have taken place under the Act or under the Gift Tax Act. In support of this proposition, he placed reliance

on the decision of the Apex Court in the case of S.P.Jaiswal v. Commissioner of Income Tax, [1997] 224 ITR 619, with special reference to the observations at pages No.625 and 626 of the Reports. He urged that the ratio of the said decision be extended and applied to the facts of the present case. On merits, the submission was that the assessing officer had carefully analyzed the evidence, including statements of the assessee and the donor, and given cogent reasons for disbelieving the explanation tendered by the assessee. The said order had been approved and upheld by the Tribunal and no interference was called for. He read extensively from the statement of the donor to submit that the giving of gift was against human probability apart from the fact that the donor did not have the capacity to make the gift.

9.The principal question that requires to be

addressed is as to whether the Tribunal was justified in reversing the order of Deputy Commissioner of Appeals in the first instance. As can be seen from the impugned order of Tribunal, the Tribunal states that the Deputy Commissioner's order has many infirmities, without enumerating anyone of them, let alone discuss the same. The Tribunal has failed to appreciate that the assessment order primarily proceeds on an analysis of the statement of the donor and the discrepancies therein as if the assessment of the donor was before the assessing officer. The Tribunal also commits the same error. The addition had been made by the assessing officer by disbelieving the explanation tendered by the assessee regarding the credit entry made in the capital account. In other words, the addition was based primarily on provision of Section 68 of the Act and the Tribunal has failed to appreciate the significance of the same. It has not discussed

in any manner whatsoever whether the requirements of the said provision stand satisfied or not.

10.Section 68 of the Act requires that there has to be a credit in the books maintained by an assessee; such credit has to be of a sum during previous year; and the assessee offers no explanation about the nature and source of such credit; or the explanation offered by the assessee is not, in the opinion of the assessing authority, satisfactory, then the sum so credited may be charged to tax as income of the assessee of the previous year. The Apex Court, in the case of Commissioner of Income Tax v. Smt.P.K.Noorjahan, [1999] 237 ITR 570, has laid down that the word “may” indicated the intention of the legislature that a discretion was conferred on the assessing officer in the matter of treating the source of investment / credit which had not been satisfactorily

explained as income of the assessee, but it was not obligatory to treat such source of income in every case where the explanation offered was found to be not satisfactory.

11.As section 68 of the Act denotes, once there is a credit in the books maintained by the assessee, the primary onus is on the assessee, namely, to offer an explanation as to nature and source of the credit. What would be the degree of the onus and what should be the extent of explanation in such circumstances, is succinctly laid down by this Court in the decision in case of CIT v. Pragati Co-operative Bank Ltd., [2005] 278 ITR 170 (Guj.) Suffice it to state that an assessee can be asked to prove the source of credit in books, but cannot be asked to prove the source of the source.

12.Unfortunately, as noted hereinbefore, the Tribunal has proceeded on an entirely

fallacious premise, when it is observed, “We have to decide the question about the genuineness of the gift on the balance of probabilities and, in our view, it is not probable that the assessee received Rs.50,000/- or any part thereof as a gift from Ramji Nanji, the donor.”. Instead of addressing itself to the requirement of section 68 of the Act, the Tribunal has adopted an approach which, to say the least, is unwarranted in law. The Tribunal states that motivation for making the gift is not established. This finding is neither here nor there. The assessee was called upon to explain the credit entry found in its capital account. The assessee pointed out that it had received a gift from Shri Ramji Nanji. Shri Ramji Nanji appears before the assessing officer and confirms the fact of having made the gift. He produces evidence in support of the source from which the funds for making the gift are available with him. The gift is given

by way of a bank draft. The revenue does not dispute any of these facts. In fact, the revenue commences the present proceedings on the day it makes gift tax assessment qua this very gift in the hands of the donor.

13.Despite this factual position, the Tribunal singularly fails to note the fact that the identity of the donor is established, the donor having appeared in person before the assessing officer, the genuineness of the transaction is established, not only by the receipt of the bank draft, but also by the fact of transaction having borne gift tax once the assessment was framed. The primary onus which rested with the assessee, thus, stood discharged. Thereafter, if the revenue was not satisfied with the source of the funds in the hands of the donor, it was upto the revenue to take appropriate action. The Tribunal fails to consider all these aspects. In fact, the donor having filed

gift tax return and assessment having been framed on the donor, is not taken into consideration by the Tribunal at all. This was a very strong factor in support of the explanation tendered by the assessee.

14.The Tribunal, to the contrary, goes on to discuss and question as to why the donor should make a gift to the assessee; the size of the donor's family and availability or otherwise of the amount in hands of the donor; the area of the land held by the donor etc. At best, these could be factors for the donor to be called upon to explain the source of the funds in his hands, but that could not be a ground for disbelieving a gift which had admittedly been received by the assessee as a gift and being treated as undisclosed income of the assessee.

15.Having gone through the statements of the donor as well as the assessee, it is apparent

that despite minor discrepancies, the factum of the gift having been made has been accepted by the donor and in the circumstances, it cannot be stated that the credit entry in the capital account of the assessee did not reflect the true picture. The assessee had shown the same as “gift received”. The assessee tendered an explanation and nothing has been brought on record to even hold for a moment that the said explanation is not satisfactory. Though the same is stated as a conclusion, the reasoning for stating so is as to disbelieving source of source. In these circumstances, the impugned order of Tribunal cannot be sustained.

16.In relation to Apex Court decision in the case of S.P.Jaiswal (supra), on which reliance has been placed on behalf of the revenue, suffice it to state that the same was in context of applicability or otherwise of provisions of Sections 60 and 61 of the Act. There the Court

was called upon to decide whether, on the facts before it, there was transfer of income where there was no transfer of the assets from which the income arises. The provision itself requires that, in such circumstances, such income shall be included in the total income of the transferor. Therefore, the observations on which reliance has been placed cannot carry the case of revenue any further. The submission that the ratio of the decision should be extended and applied in the present set of circumstances cannot be accepted for the simple reason that Sections 60 and 61 fall under Chapter V of the Act, which deals with the income of other persons, included in assessee's total income. As against that, the present case is governed by provisions of Section 68 of the Act, which falls in Chapter VI of the Act, relating to aggregation of income and set off or carry forward of loss, with special reference to items of credit, investments etc.

which are “deemed income” as and when the conditions stipulated in the respective sections are shown to have been fulfilled.

17.The principal question that requires to be addressed is as to whether the Tribunal was justified in reversing the order of Deputy Commissioner of Appeals in the first instance. As can be seen from the impugned order of Tribunal, the Tribunal states that the Deputy Commissioner's order has many infirmities, without enumerating anyone of them, let alone discuss the same. The Tribunal has failed to appreciate that the assessment order primarily proceeds on an analysis of the statement of the donor and the discrepancies therein as if the assessment of the donor was before the assessing officer. The Tribunal also commits the same error. The addition had been made by the assessing officer by disbelieving the explanation tendered by the assessee regarding

the credit entry made in the capital account. In other words, the addition was based primarily on provision of Section 68 of the Act and the Tribunal has failed to appreciate the significance of the same. It has not discussed in any manner whatsoever whether the requirements of the said provision stand satisfied or not.

18.The Tribunal, after holding that the gift was not genuine, goes on to state that, therefore, there was no full and true disclosure by the assessee in the original return of income, and that the facts came to light only during gift tax assessment proceedings in the hands of Shri Ramji Nanji. However, in the view that the Court has taken on merits, it is not necessary to render any opinion in relation to question No.1 relating to reopening under section 147(a) of the Act.

19.In the result, question No.2 is answered in the negative i.e. in favour of the assessee and against the revenue. Question No.1 is left unanswered.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]

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